Dr Edina Harbinja, Aston University[1] and Prof Lilian Edwards, Newcastle University[2] – written submission

NSW Law Reform Commission: Access to digital assets upon death or incapacity

Please note that we will only answer questions related to digital assets of the deceased, as our research does not cover the access to digital assets upon incapacity.

(1) When a person dies what should it be possible for third parties to do in relation to the person's digital assets? In particular:

(a) Who should be able to access those assets?

(b) What assets should they be able to access?

(c) For what purposes should they be able to access them?

(d) What documentation should be needed to authorise a person to access those assets?

(e) What restrictions should there be on that access?

1. As noted by the Commission, some of the key answers to these questions turn on whether the content and/or user's account can be considered property or not. User accounts are created through contracts between service providers and users (often known as "terms of service"), and the account itself and the underlying software are best regarded as the property/intellectual property of the service provider. However, the legal nature of the user-provided content itself is not as clear (see para 10 and 11 below). If the content is property, then the answer is simple for most jurisdictions, including NSW: it transmits on death as part of the deceased's estate in the normal way, via will or intestate succession. Issues might arise however if content such as simple exchanges on social media sites were regarded as neither property nor, perhaps, a copyrighted work; this is something that needs resolved by the underlying law of property.[i] Clarity on this is crucial to knowing the powers of administrators to access and ingather digital assets when settling an estate. For clarity, and to avoid any issues regarding the definition of property, we suggest that a law equivalent to that in the US providing powers to personal representatives (PR) in relation to digital assets (see below para 4, 5 and 6) should be included in the law, regardless of the nature of the digital assets involved.

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2. The Commission in Consultation paper 20, para 3.5 notes: 'Under the *Succession Act 2006* (NSW) ("*Succession Act*"), a person may give away property to which they are entitled at the time of their death through a will. They can also specify how their property is to be controlled.' An amendment would cover personal digital assets if an amendment included 'other interests'. This would account for post-mortem privacy, as not all assets can be considered property, as noted above, and as provided by the *Interpretation Act 1987* (NSW), "property" means "any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description, including money, and includes things in action".

3. Access to digital assets should always be exercised after death only by personal representatives (PRs) of the deceased, and there should be no default access for families/friends of the deceased to digital assets. This replicates the regular situation for non-digital assets. There is a need to balance the heirs' interests in remembering the deceased and receiving economic benefits from them, with the privacy interests of the deceased, as well as considering the practical issues for platforms who host these assets. The PR is best equipped legally and practically to strike these balances and be a single point of contact for the platform so they have certainty when giving access to assets of the deceased.

4. However an issue which has been canvassed in other jurisdictions is that automatic access by a PR on death, as with conventional assets of the estate, may have the effect of transferring highly private digital content (e.g. intimate blog posts) to family members after death (see discussion at para 10-12 below), and this may not be what the deceased would have preferred. Accordingly, we suggest that access rights of the PR be amended slightly in relation to certain digital assets, so to provide for the most nuanced legislative solution to date. Those assets that are intrinsically likely to be highly personal (e.g. Friends-locked social media accounts) should be treated differently from those that are likely to be non-private or principally of monetary value (e.g. virtual worlds and games account, financial accounts, domain names, Amazon or eBay accounts).

5. Another issue worth considering is that sites increasingly provider online tools allowing users to indicate choices about what happens to their digital assets on that site after their death (e.g. Google Inactive Account Manager or Facebook Legacy). These tools act independently of conventional wills, which has the potential to produce conflicts and confusion in the estate administration process. The US Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) suggests that the powers of the PR as well as the site or platform hosting the asset be expressly limited by (a) a user's will and (b) any intent expressed in his choice to use online tools to dispose of all of his digital assets. Furthermore, the user's choice to use a site-specific tool should override any general provisions of his will e.g. a general disposal of the estate to the spouse.[ii]

6. In the absence of the express direction by the deceased, the access to personal digital assets and communications should be restricted to a catalogue of communications, and not the content of these communications, unless there is a court order.[3] This would reconcile privacy interests of the deceased, terms and conditions which mostly limit the access as seen below, and the personal representatives' access rights to administer the estate of the deceased. In summary, for personal

[3] A similar provisions exists in the US RUFADAA, section 7. RUFADAA gives personal representatives default access to the "catalogue" of electronic communications and other digital assets not protected by federal privacy law (i.e. the content of communication which is protected and can only be disclosed if the user consented to disclosure or if a court orders disclosure).

assets, we suggest a hierarchy of instructions to be followed by PR as follows: (a) site-specific tools, (b) will, (c) failing this distribution of assets falls to be governed by any terms of service relevant and only catalogue of communications accessible by default. For monetary assets, unfettered access should be allowed to the PR and there should be an explicit provision for clarity that this access right trumps terms of service of the platform even if they provide to the contrary.

7. The document required by the PR to secure access should be the same as that required to access normal non-digital assets of the estate, e.g. grant of probate of the will or letters of administration. We see no reason for a different scheme of authorisation.

(3) Should NSW enact a law that specifically provides for third party access to a person's digital assets upon death or incapacity? Why or why not?

8. As noted in paras 3-6 above, we suggest that a law similar to that in the US providing powers to administrators in relation to digital assets should be enacted in NSW. Such laws are becoming the norm in a variety of jurisdictions (e.g. France, Canada). In the Digital Republics Act 2016, France has adopted a solution quite similar to the US RUFADAA. Article 63(2) of the Act states that anyone can set general or specific directives for preservation, deletion, and disclosure of his personal data after death. These directives would be registered with a certified third party (for general ones) or with the service provider who holds the data (e.g. Facebook or Google).[iii]

(4) If NSW were to legislate to provide specifically for third party access to a person's digital assets upon death or incapacity:

How should the law define "digital assets"?

9. Conceptually, the notion of digital assets is a relatively new phenomenon globally, lacking a settled legal definition. For instance, from a lay person's perspective, it could be anything valuable online, any asset (account, file, document, digital footprint) that has a personal, economic or social attachment to an individual. The legal meaning, however, needs a little more precision. So far, a few attempts have been made to define and classify them. Most of the definitions are, however, inductive and try to theorise starting from the existing assets online, trying to make appropriate generalisations and classifications.[iv] These authors also attempted to define it in their early work in the area.[v]

10. We propose that digital assets are defined as *any intangible asset of personal or economic value created, purchased or stored online*. Such assets should clearly be defined as property, which simplifies the application of conventional estate administration law (see para 1and 2 above). We also suggest clearly *excluding* from the definition the infrastructure of hosts, social media sites and websites where digital assets may be created and maintained e.g. cloud storage, social media sites, games, virtual worlds, as the predominant property/IP interests here are of those who own and invest in these sites, rather than the users.

(b) How can the law appropriately balance privacy considerations with access rights?

11. A significant issue surrounding digital assets and death is post-mortem privacy, i.e. the protection of the deceased's personal data. Many digital assets include a large amount of highly personal data (e.g. emails, social media content), and so regulating them involves consideration of not just property but privacy laws and norms. NSW law does not currently protect post-mortem privacy. This is similar to many other countries, both common and civil law ones.[vi] In English law, for example, the principle has traditionally been *actio personalis moritur cum persona*, meaning personal causes of action die with the person, (see *Baker v. Bolton*). This principle has been revised by legislation mainly in many contexts for reasons of social policy, but it persists in relation to privacy and DP.[vii] In the EU, The General Data Protection Regulation(GDPR) in recital 27 permits member states to introduce some sort of protection for the deceased's data, and some states have already provided for this protection.[viii]

12. We suggest that post-mortem privacy deserves legal consideration in the NSW. The conventional common law view has essentially been that privacy interests disappear on death while the economic, as well as dignitary interests of the living, are worth protection. However, this balance has been shifted by the current world where vast amounts of highly sensitive material are routinely left in digital accounts by users who have in the main probably never considered the consequences of revelations if they were to die. The volume and ease of creating a "digital archive" or a "digital footprint", which if revealed on death could be embarrassing, humiliating or harmful to the memory of the deceased and/or their heirs, partners and friends, argues, we suggest, for a reconsideration of the need to protect post-mortem privacy, both in the interests of the dead and the living.[ix] As already noted this approach is gaining favour, e.g. in France, and also in the US, where the deceased's wishes and privacy interest expressed pre-mortem override the interest of their heirs.

13. We suggest, therefore, that post-mortem privacy considerations are balanced with access rights in the manner suggested in our para 6 above i.e. that the automatic access rights of the PR be amended where access is to highly personal content, and the hierarchy to be established as follows: (a) site-specific tools, (b) will, (c) failing this distribution of assets falls to be governed by any terms of service relevant and only catalogue of communications accessible by default. This does not affect purely monetary assets, as suggested in para 6.

(c) How can the law best overcome conflicting provisions in service agreements?

(d) How can the law best overcome provisions in service agreements that apply the law of some other jurisdiction?

(e) What else should the law provide for?

14. As noted above, we suggest that in line with the conventional law of wills, the wishes of the deceased, where recorded and thus akin to testamentary dispositions, should take precedence over the terms of service of the platform in most scenarios. Thus we suggest above that the PR of the deceased should always have rights of access to the digital assets on a platform (subject to

limitations for highly personal assets, in the interests of post-mortem privacy) even where terms of service do not allow this or demand that assets be deleted on death. We thus agree with the Commission's proposal set out in para 3.59: 'One way to resolve these issues might be to prevent the operation of terms of service agreements that restrict third-party access in limited circumstances". Such an approach may make practical and economic demands on service providers and it is possible sectoral codes of conduct may be needed to manage the detail of this. However, there is already clear evidence (see below) that both Google and Facebook are taking the rights and interests of their users after death seriously and it is likely this approach will soon be taken up by other players in the market.

15. In-service solutions (Consultation paper 20 paras 3.21 – 3.42), such as Facebook Legacy Contact and Google Inactive Account Manager are interesting and in our view positive development in service contracts.[x] They empower users and foster their autonomy and choice. They also can provide clarity to heirs and platforms. They can be seen as a start towards a method of making wills on social media or when online, rather than making a will being a separate enterprise. This is we argue positive because it is well known that people in the main do not make wills and that more than 50% of the population (depending on jurisdiction) dies intestate. We would thus argue that testator's intentions expressed via in-service solutions, as in wills, should, therefore, be respected by the law and implemented by PRs.

16. However, the main problem with these solutions is that their provisions might clash with a will (possibly made substantially later in life); or with the rules of intestate succession and heirs' interests. To illustrate this, a friend can be named as a beneficiary for Google or Facebook services, but they would not in most legal systems be heirs or next-of-kin in intestate succession. The US Uniform Law Commission in the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) recognises such tools as a form of wills.[xi]

17. We also note that we are not aware how far NSW consumers are making use of these services. Anecdotally, this use is extremely low. Users should be made aware of these and service providers need to make more effort in this regard too. Empirical research, we suggest, is needed both into the volume of usage, user awareness and user opinions on these tools and their relationship with conventional wills and inheritance rules, before any special rules are made.

(5) What alternative approaches might be desirable to deal with the issue of third party access to digital assets upon death or incapacity?

(6) What amendments could be made to existing NSW laws to ensure appropriate third party access to digital assets upon death or incapacity?

18. In addition to fiduciary access, the act should address all the other issues related to property, copyright, criminal law and privacy, and amend the relevant legislation in NSW, so to offer a comprehensive solution. Ideally, there will be amendments to the NSW privacy laws as well, at least in order to broaden the definition of personal data and provide for an option of protecting deceased's data post-mortem through specialised legislation ('lex specialis'), such as an act that would regulate fiduciary access to digital assets.

We are happy to provide further assistance and advice to the Commission if required.

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[i] Edwards, Lilian and Harbinja, Edina, '"What Happens to My Facebook Profile When I Die?": Legal Issues Around Transmission of Digital Assets on Death' in Cristiano Maciel and Vinicius Pereira (eds) Digital Legacy and Interaction: Post-Mortem Issues (Springer, 2013) Available at SSRN: http://ssrn.com/abstract=2222163; Edwards, Lilian and Harbinja, Edina 'Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World' (2013) 32(1) Cardozo Arts & Entertainment 101; Harbinja, Edina 'Social media and death' in Lorna Gillies and David Mangan (eds) The Legal Challenges of Social Media (Edward Elgar Publishing, 2017); Harbinja, Edina, 'Digital Inheritance in the United Kingdom' December 2017, The Journal of European Consumer and Market Law (EuCML)

[ii] RUFADAA section 4

[iii] Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique https://www.legifrance.gouv.fr/eli/loi/2016/10/7/ECFI1524250L/jo

[iv] E. Harbinja, *Legal Aspects of Transmission of Digital Assets on Death* (PhD thesis, University of Strathclyde, 2017), 18-25.

[v] L Edwards & E Harbinja 'What Happens to My Facebook Profile When I Die?': Legal Issues Around Transmission of Digital Assets on Death' in C Maciel & V Pereira (eds.) *Digital Legacy and Interaction: Post-Mortem Issues* (Springer, 2013)

[vi] Edwards, Lilian and Harbinja, Edina 'Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World' (2013) 32(1) Cardozo Arts & Entertainment 101; Harbinja, Edina 'Post-mortem privacy 2.0: Theory, law and technology' (2017) 31 International Review of Law, Computers & Technology, available at http://www.tandfonline.com/doi/citedby/10.1080/13600869.2017.1275116?scroll=top&needAccess=true; Castex, L, Harbinja, E and Rossi, J, 'Défendre les vivants ou les morts ? Controverses sous-jacentes au droit des données post-mortem à travers une perspective comparée franco-américaine', Réseaux, May 2018

[vii] Ibid

[viii] E.g. France, Spain, Catalonia, Hungary, see Castex, L, Harbinja, E and Rossi, J, 'Défendre les vivants ou les morts ? Controverses sous-jacentes au droit des données post-mortem à travers une perspective comparée franco-américaine', Réseaux, May 2018

[ix] Edwards, Lilian and Harbinja, Edina 'Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World' (2013) 32(1) Cardozo Arts & Entertainment 101; Harbinja, Edina 'Post-mortem privacy 2.0: Theory, law and technology' (2017) 31 International Review of Law, Computers & Technology, available at http://www.tandfonline.com/doi/citedby/10.1080/13600869.2017.1275116?scroll=top&needAccess=true

[x] Ibid

[xi] RUFADAA section 4.